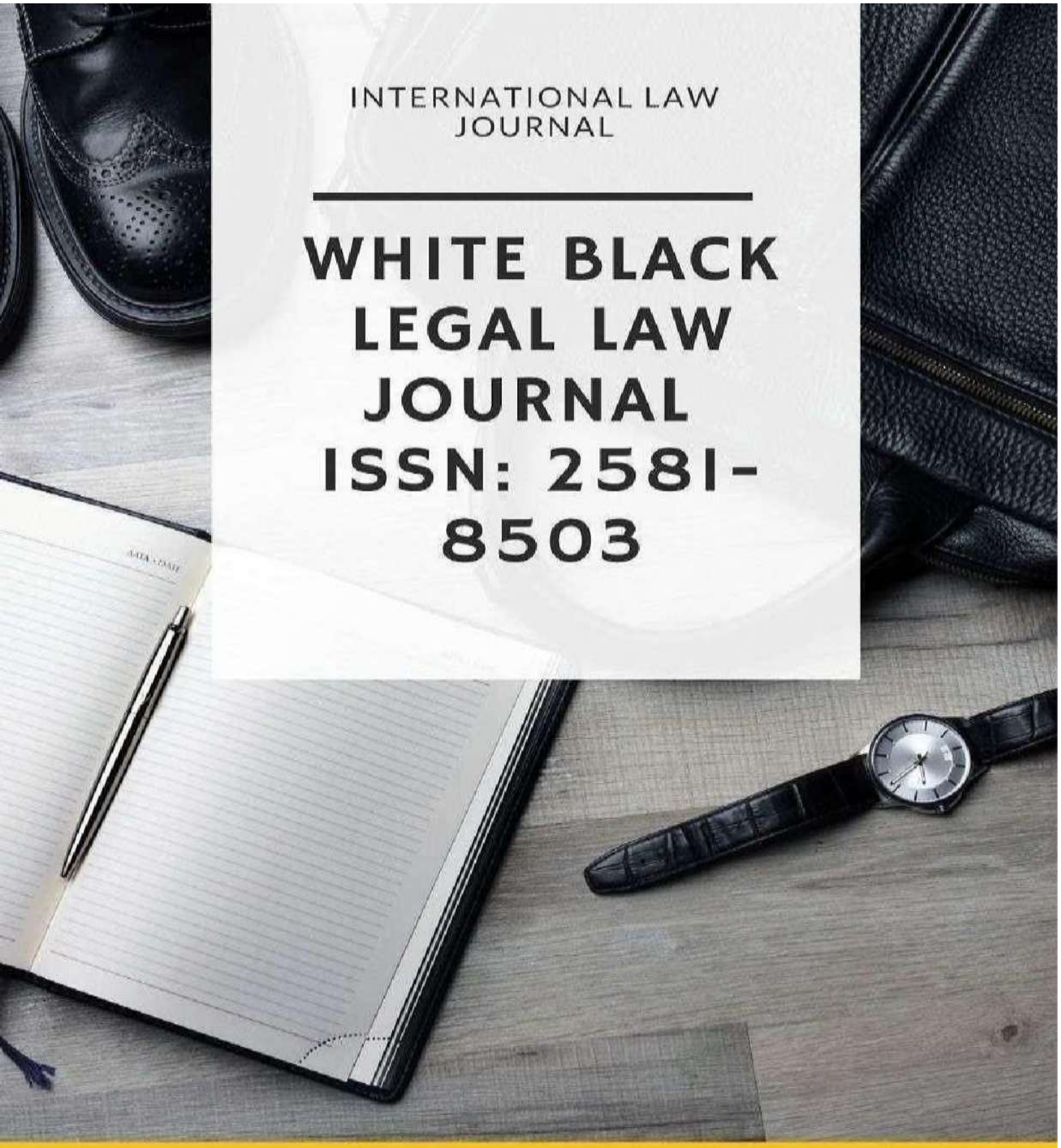

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE PEARL OF JUDICIAL ACTIVISM AND THE PERIL OF JUDICIAL ADVENTURISM

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Abstract:

The judiciary is one of the prominent wings of the government which acts as the interpreter of the constitutional commitments and statutory provisions. However, many times the judiciary breaks its traditionally pigeonholed function and steps forward with its creativity for the sake of the welfare of the society which is termed as judicial activism.

The article depicts the meaning and significance of judicial activism along with its evolution in the Indian legal arena. It has led to emergence of judicial craftsmanship, public interest litigation, and dynamism in interpretation. However, it has simultaneously generated the fear of the violation of the principle of separation of power. In this backdrop, the concept of judicial overreach with the certain examples is also discussed to give the glimpse of its danger and highlight the subtle difference between judicial activism and judicial adventurism. At the end of the article, the need of judicial restraint has been emphasised to maintain the delicate balance of separation of power among all the wings of the government.

Key Words:
Judicial Activism, Separation of Power, Judicial Overreach and Judicial Restraint.

The Pearl Of Judicial Activism And The Peril Of Judicial Adventurism

The theory of separation of power posits the existence of 'trias politica' namely, legislature, executive and judiciary in order to maintain an equilibrium, and run democratic and accountable government, as reflected by Montesquieu. However, judiciary, nowadays, has emerged as the most pioneer branch of the government owing to the adoption of the idea of judicial dynamism or activism. In the view of Justice Markandey Katju, judicial activism is a tool of social engineering which is closely associated with the idea of constitutional interpretation, statutory construction, judicial creativity, legal dynamism and judicial

legislation.[1]

The term "Judicial activist" was coined by Arthur Schlesinger in an article published in Fortune in 1947; and Theriotv. Mercer[2] was the first judicial pronouncement in which this term was used. According to Black's Law Dictionary, 'judicial activism is a philosophy of decision-making whereby judges allow their personal views about public policies, among other factors, to guide their decisions'.[3]This is devised to established participatory democracy, the rule of law, political unfairness, constitutional morality and to voice the unheard voices. The concept of judicial activism violates Anglo-Saxon tradition which advocates that the judiciary has been entrusted with the task of interpreting the laws and therefore it should refrain from legislating. In short, judicial activism involves creative and pragmatic interpretations which adopt the spirit of the law that are consistent with existing needs of the subjects.

SubhashKashyap affirms that there are certain circumstances when the judiciary may overstep its customary jurisdiction and enter into the arena of the legislature and the executive such as legal incompetence of the two other wings of the government, in situations of hung assembly and misuse of power by authoritarian parliamentary party. Besides, there are various reasons behind the evolution of judicial dynamism and some of them are given below:[4]

- The legislature and executive fail to discharge their responsibilities properly;
- The citizens have generated high expectations from the courts to protect their rights;
- Judicial passion and participatory role of judges which liberalize principle of 'locus standi';
- To fill legislative vacuums;
- The constitution of India also provides sufficient playing field for creative and innovative moves of judiciary.

Fundamentally, the power of judicial review is the edifice upon which the idea of judicial activism rests. In US, Marbury v. Madison[5] judgement opened the door for the judiciary to play proactive roles, consequently the power of the judiciary expanded. Article 13 read with Articles 32 and 226 of the constitution of India confer upon the power of judicial review to Indian

[1]Justice Markandey Katju, *Separation of Powers, Judicial Review and Judicial Activism*, SATYAM BRUYAT (Oct. 24, 2014, 09:50 AM), http://justicekatju.blogspot.com/2013/10/separation-of-powers-judicial-review.html.
[2]377 U.S. 152 (1964).
[3]Black's Law Dictionary 922 (9th ed. 2004).
[4]Dr. B.L. WADEHRA, PUBLIC INTEREST LITIGATION: A HANDBOOK 161-62 (2nd ed. 2009).
[5]5 U.S. 1 Cranch 137 (1803).

courts. Golaknath case,[6] Bank Nationalisation case,[7]Kesavananda judgement,[8]Maneka Gandhi case[9]and Minerva Mills case[10]marked the watershed in the development of judicial activism. Justice V.R. Krishna Iyer, Justice P.N. Bhagwati, Justice O. Chinnappa Reddy and Justice D.A. Desai are the legal luminaries who brought and developed this idea in India. These landmark verdicts and legal veterans shifted the judicial outlook from positivist to sociological approach. Judicial activism has multi-dimensional impact, and it has influenced almost all the spheres of private and public lives.[11] In the field of environment, numerous orders have been passed by the judiciary for the protection and conservation of forests,[12] the ban on vehicular pollution[13] and protection of TajMahal from degradation[14] etc. The judiciary has extended its proactive interventions in various cases of gross violation of human rights and also annunciated various rights including the Right to Protection against Solitary Confinement,[15] the Right Not be Held in Fetters,[16] the Right against Custodial Violence,[17] the Right of the Arrested Persons,[18] and the Right to Live with Human Dignity[19] etc. In the matters related with child, how children of prostitutes should be educated,[20] how the child should be adopted by the foreign parents,[21] the fundamental right of elementary education[22] and the Directions to Reduce Child Prostitution[23] are the landmark decisions of the courts. In the realm of women empowerment, the judiciary has delivered a plethora of judgements such as providing equal pay for equal work for both men and women,[24] Rights of Women Prisoners in Pregnancy and of their Children,[25] framing guideline for protection of working women at work place,[26]issuing guideline for the protection of acid attack victims[27] and recognizing woman guardianship rights[28] etc.

[6]Golaknath v. State Of Punjab 1967 A.I.R. 1643.
[7]R.C. Cooper v. Union of India A.I.R. 1970 S.C. 564.
[8]KesavanandaBharati v. State of Kerala (1973) 4 S.C.C. 225.
[9]Maneka Gandhi v. Union Of India 1978 A.I.R. 597.
[10]Minerva Mills Ltd. v. Union Of India A.I.R. 1980 S.C. 1789.
[11]DR. VANDANA, DIMENSIONS OF JUDICIAL ACTIVISM IN INDIA 33-34 (1st ed. 2013).
[12]T.N. GodavarmanThirumulpad v. Union Of India A.I.R. 1997 S.C. 1228.
[13]M.C. Mehta v. Union Of India (1991) 2 S.C.C. 353.
[14]M.C. Mehta v. Union Of India 1987 A.I.R. 1086.
[15]Sunil Batra v. Delhi Administration 1978 A.I.R. 1675.
[16]Charles Sobraj v. The Suptd., Central Jail, Tihar 1978 A.I.R. 1514.
[17]NilabatiBehera v. State of Orissa 1993 A.I.R. 1960.
[18]D.K. Basu v. State of W.B. A.I.R. 1997 S.C. 610.
[19]BandhuaMuktiMorcha v. Union of India 1984 A.I.R. 802.
[20]Gaurav Jain v. Union Of India A.I.R. 1990 S.C. 292.
[21]LaxmikantPandey v. Union Of India A.I.R. 1987 S.C. 232.
[22]Unni Krishnan J.P v. State of Andhra Pradesh 1993 A.I.R. 2178.
[23]Vishal Jeet v. Union of India Writ Petition (Criminal) No. 421 of 1989.
[24]Randhir Singh v. Union of India 1982 A.I.R. 879.
[25]R.D. Upadhyayvs State Of A.P. Writ Petition (civil) 559 of 1994.
[26]Vishaka v. State of Rajasthan A.I.R. 1997 S.C. 3011.
[27]Laxmi v. Union of India A.I.R. 2015 S.C. 3662.
[28]Ms.GithaHariharan v. Reserve Bank Of India A.I.R. 1999 S.C. 1149.

Furthermore, the study of judicial activism is not complete without the discussion of public interest litigation. Public interest litigation is a result of judicial move towards establishing welfare society and relaxing the rule of 'locus standi' to bring justice to the doorstep of the common masses. Justice Krishna Iyer precisely remarked "judicial activism gets its highest bonus when its order wipes some tears from some eyes".[29] Mumbai Kamgar Sabha case,[30]Hussainara Khatoon judgement,[31] Fertilizer Corporation Kamgar v. Union of India[32] and S.P. Gupta v. President of India[33] judgements turned the judiciary into a crusader of socio-economic justice. A catena of rights has emerged from art. 21 due to judicial activism. The Right to Livelihood,[34] Right to Health and Medical Assistance,[35] Right to Legal Aid,[36] Right to Get Pollution Free Water and Air,[37]and Right to Privacy[38] are a few notable outcomes of judicial activism.

But, as each coin has two aspects, the idea of judicial craftsmanship does not always paint rosy pictures. Many a times, judicial activism raises several jurisprudential questions. In the view of UpendraBaxi, judicial dynamism has generated certain apprehensions like ideological fears, epistemic fears, management fears, legitimating fears, democratic fears and biographic fears. Judicial activism privileges subjectivity and personal opinion based pronouncements. When the courts overlook legally permissible zones, and illegitimately leap into the domain of legislature and executive, it becomes judicial adventurism or overreach. The act of intervention in administrative or legislative domain in the long-run becomes detrimental for democratic set up and threatens the balance created by the separation of power. The supreme court verdict to declare the National Judicial Appointments Commission Act null and void,[39] an order to the government to make the Central Bureau of Investigation transparent and accountable,[40]and the directions to the union government to modify the Drought Management Manual and form a National Disaster Mitigation Fund within a limited period[41] are the instances of judicial

[29]Azad Rickshaw pullers v. State of Panjab 1981 A.I.R. 14.
[30]Mumbai Kamgar Sabha v. M/s AbdulbhaiFaizullabhai [1976(3 S.C.C. 832.
[31]HussainaraKhatoon v. Home Secretary, State Of Bihar 1979 A.I.R. 1369.
[32]1981 A.I.R. 344.
[33]A.I.R. 1982 S.C. 149.
[34]Olga Tellis v. Bombay Municipal Corporation 1986 A.I.R. 180.
[35]ParmanandKatara v. Union Of India 1989 A.I.R. 2039.
[36]MadhavHayawadanraoHoskot v. State Of Maharashtra 1978 A.I.R. 1548.
[37]Subhash Kumar v. State Of Bihar 1991 A.I.R. 420.
[38]Justice K.S. Puttaswamy v. Union of India (2017) 10 S.C.C. 1.
[39]Supreme Court Advocates on Record Association v. Union of India Writ Petition (Civil) no. 13 of 2015.
[40]VineetNarain v. Union Of India (1998) 1 S.C.C. 226.
[41]SwarajAbhiyan v. Union Of India Writ Petition (Civil) No. 857 of 2015.

encroachment into the domain of the legislature and the executive. The court delivered 7 directives for the police reform,[42] issued various orders for cricket reforms,[43] made mandatory the playing of national anthem before featuring a film in a cinema hall[44] and the order of banning the sale of liquor within 500 METER of any national or state highway[45] are also instances of judicial intrusion.

The glaring examples of judicial impingement are alarming signals which indicate that the time has come to combat with this democratic disaster. It is axiomatic that it is the judiciary which is responsible for all these events of judicial adventurism and therefore, there is no better option than judicial restraint to put an end to this trend. Judiciary should follow self-restraint by not encroaching into the field of the legislature and executive organs.[46] The theory is that the popular will is properly represented by legislative bodies and people are themselves responsible for their political preferences. At this juncture, it is necessary to outline the observations of different scholars that endorse the limited intervention of the judiciary which are prevalent in the USA and equally relevant in Indian scenario such as:[47]

- The courts are non-elective and apparently non-responsive organ of the government;
- The separation of power gets hampered;
- The idea of federalism seeks the Court deference towards the action of state machinery;
- The judiciary should not transgress its limits without assessing the risk involved as its jurisdiction and effectiveness are dependent upon the Congress and public acceptance respectively;
- As per aristocratic perspective, the judiciary should refrain from politics and power since law is a field of reason, not politics.

Furthermore, Indian Apex Court has rightly expressed its view that judges should play within their playing field and do not act like philosopher-kings.[48] It was also held that declaring any move of legislature null and void is a grave step and it must be meticulously evaluated.[49] Judicial restraint encapsulates two ideas. Firstly, it fosters equality among all the wings of

[42]In Prakash Singh v. Union of India Writ Petition (civil) 310 of 1996.
[43]BCCI v. Cricket Association of Bihar (2015) 3 S.C.C. 251.
[44]Shyam Narayan Chouksey v. Union of India Writ Petition(s)(Civil) No(s). 855/2016.
[45]State of Tamil Nadu v. K. Balu (2017) 2 S.C.C. 281.
[46]IAIN MCLEAN & ALISTAIR MCMILLAN, OXFORD CONCISE DICTIONARY OF POLITICS 284 (1st ed. 2004).
[47]JOEL B. GROSSMAN & RICHARD S. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 56-57 (1st ed. 1972).
[48]Divisional Manager,Aravali Golf Club v. Chander Hass (2008) 1 S.C.C. 683.
[49]Government Of Andhra Pradesh Vs. P. Laxmi Devi (2008) 4 S.C.C. 720.

government and put a ceiling on inter-branch encroachment which is also termed as judicial respect. Secondly, disregard of judicial restraint would hamper independence of the judiciary.[50] In a nutshell, the judiciary should understand the true objective and the huge responsibility of judicial activism which stands apparently different from the idea of judicial stagnation as well as judicial adventurism. The legal quandary of the judicial overreach can be suitably addressed by the thought-out consensus on constitutional values and conventions between the judiciary on the one hand and the legislature and the executive on the other. In a legal framework, the practice of Judicial activism in the situations of pressing needs and judicial restraint with due diligence should be adopted to ensure welfare of the common masses, maintain the delicate balance of separation of power, protect the rights of individuals and promote functional democracy.

[50]State of U.P. v. Jeet S. Bisht (2007) 6 S.C.C. 586.